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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products Liability Litigation	MDL NO. 15-02641-PHX-DGC
This Document Relates to:	
WAYNE RUDEN, Plaintiff, v. C. R. BARD, INC., a New Jersey Corporation; AND BARD PERIPHERAL VASCULAR INC., an Arizona Corporation, Defendants.	Case No. CV-16-00344-PHX-DGC **DEFENDANTS C. R. BARD, INC. AND BARD PERIPHERAL VASCULAR, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND**

Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively, "Bard") hereby file this Response in Opposition to Plaintiff's Motion to Remand ("Plaintiffs'

Motion").

I. INTRODUCTION

This Court should deny Plaintiff's Motion because Bard properly removed this case to federal court based on diversity jurisdiction. Bard is a corporation that is not a citizen of California, and Plaintiff is a California citizen. *See* Compl. [Dkt. No. 1-2] at ¶¶ 3, 7-8. Although Defendant California Pacific Medical Center ("CPMC") is allegedly a citizen of California, its citizenship should be ignored for purposes of determining diversity because Plaintiff's claims against CPMC do not arise from the same transaction or occurrence or series of transactions or occurrences as his product liability claims against Bard. Therefore, Plaintiff has fraudulently misjoined CPMC.[1]

Alternatively, Bard requests that this Court sever and remand Plaintiff's claims against CPMC pursuant to Federal Rules of Civil Procedure Rule 21 so that Plaintiff's remaining product liability claims against Bard can stay and be decided in this MDL. *See, e.g.*, *Sutton v. Davol, Inc.*, 251 F.R.D. 500, 505 (E.D. Cal. 2008) (severing and remanding fraudulently misjoined medical malpractice claims against health care providers in product liability action against medical device manufacturer); *Greene v. Wyeth*, 344 F. Supp. 2d 674, 685 (D. Nev. 2004) (severing and remanding medical malpractice claims against a health care provider in a products liability action against a pharmaceutical company).

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed this action on October 7, 2015 in the Superior Court of the State of California for the County of San Francisco. Bard received Plaintiff's Original Complaint on October 13, 2015. On November 12, 2015, Bard timely removed the case to the United States District Court for the Northern District of California based on diversity jurisdiction under 18 U.S.C. § 1332. *See* Bard's Notice of Removal [Dkt. No. 1]. Diversity jurisdiction exists

[1] Additionally, CPMC has filed a Motion to Dismiss [MDL 2641 Dkt. No. 870], arguing that Plaintiff fails to state a claim against CPMC that is plausible on its face. *See id.* at 1-16. To the extent this Court agrees that Plaintiff has failed to state a claim against CPMC, CPMC is fraudulently *joined*, and its citizenship may be ignored for purposes of determining diversity jurisdiction. *See McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).

because the non-diverse health care provider defendant, CPMC, has been fraudulently misjoined by Plaintiff. Accordingly, CPMC's citizenship should be ignored for purposes of determining whether diversity of citizenship exists. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996) (holding diversity of citizenship requirement was satisfied by reason of fraudulent misjoinder doctrine because the alleged transactions involving the non-diverse defendants were wholly distinct from the alleged transactions involving the diverse defendants), *abrogated on other grounds in Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000).

Bard and CPMC subsequently filed Motions to Dismiss on November 19, 2015 and December 1, 2015, respectively. *See* Motions to Dismiss [Dkt. Nos. 18 and 28]. On December 3, 2015, Plaintiff filed his First Amended Complaint [Dkt. No. 31] ("FAC") in an apparent attempt to address the multiple problems in his Original Complaint as pointed out by Bard in its Notice of Removal [Dkt. No. 1] and by all defendants' in their Motions to Dismiss [Dkt. Nos. 18 and 28]. In particular, likely recognizing that the claims in his Original Complaint against Bard and CPMC do not arise out of the same transaction or occurrence, Plaintiff in his FAC has attempted to plead additional facts that purport to link his claims against Bard and CPMC. *See, e.g.*, FAC [Dkt. No. 31] at ¶ 48.

On February 4, 2016, this action was transferred to this MDL No. 2641, because Plaintiff makes the same allegations against Bard that the plaintiffs in the MDL make. *See* Transfer Order [MDL 2641 Dkt. No. 562]. On February 9, 2016, Plaintiff filed the instant Motion to Remand. *See* Pl.'s Mot. to Remand [MDL 2641 Dkt. No. 603].

III. LEGAL ARGUMENT

A. Plaintiff Has Fraudulently Misjoined CPMC

1. Plaintiff's Original Complaint Governs Whether Removal Is Appropriate

Plaintiff filed his FAC on December 3, 2015 in an attempt to address the multiple problems in his Original Complaint as pointed out by Bard in its Notice of Removal and by all defendants' in their Motions to Dismiss. Importantly, Bard's Notice of Removal points out

that Plaintiff's allegations in his Original Complaint against CPMC relate exclusively to CPMC's alleged inaction in failing to inform Plaintiff about a publically available FDA notice in August 2010, more than six years after CPMC treated Plaintiff. *See* Bard's Notice of Removal [Dkt. No. 1] at p. 2. Plaintiff's allegations in his Original Complaint against CPMC do not relate to CPMC's care and treatment of Plaintiff when he received his Bard IVC Filter in 2004. *See id.* Recognizing that his allegations against Bard and CPMC do not arise out of the same transaction or occurrence, Plaintiff amended his Complaint and re-cast his allegations against CPMC as somehow relating to CPMC's treatment and care of Plaintiff in 2004. *See, e.g.*, Pl.'s FAC [Dkt. No. 31] at ¶ 12 (asserting an entirely new theory of liability against CPMC that it allegedly "already knew at that time of implementation, but failed to inform Plaintiff, that the device had hidden dangers"); *id.* at ¶ 11 (asserting new argument that CPMC allegedly "knew the BRF was defective and unreasonably dangerous and was causing injury and death to patients who received it").[2]

For purposes of determining whether it has subject matter jurisdiction, this Court should examine the complaint that existed at the time of removal. *See Bennett v. First Am. Prop. & Cas. Ins. Co.*, No. CV-15-08003-PCT-JAT, 2015 WL 1969087, at *2 (D. Ariz. May 1, 2015) ("'[J]urisdiction must be analyzed on the basis of the pleadings filed at the time of removal without reference to subsequent amendments.'" (quoting *Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1213 (9th Cir. 1998))); *Shupe v. Cricket Commc'ns, Inc.*, No. CIV 13-1052-TUC-CKJ, 2014 WL 119458, at *4 (D. Ariz. Jan. 14, 2014) ("In determining whether a defendant properly removed a complaint, a court must examine the complaint as it existed when the petition for removal was filed."); *Addington v. Bradford*, No. CV-08-1728-PHX-NVW, 2008 WL 4999163, at *1 (D. Ariz. Nov. 21, 2008) ("Jurisdiction under 28 U.S.C. § 1441 depends solely on the complaint filed in state court, irrespective of post-removal amendments."); *Stonebrae, L.P. v. Toll Bros.*, No. C-08-0221

[2] Paragraphs 11 and 12 of Plaintiff's First Amended Complaint are new and are not found in Plaintiff's Original Complaint. *Compare* Pl.'s Original Complaint [Dkt. No. 1-2] *with* Pl.'s FAC [Dkt. No. 31].

EMC, 2008 WL 2157000, at *5 (N.D. Cal. May 21, 2008) (refusing to consider the plaintiff's first amended complaint, filed four days after removal in an attempt to defeat diversity jurisdiction, and instead considering only the plaintiff's original complaint); *see also Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1426 n.12 (9th Cir. 1989) (noting that because the right of removal is determined by the pleadings as they stand when the petition for removal is filed, the court "will not consider the allegations contained in [an] unfiled Proposed First Amended Complaint").

Here, at the time of removal, Plaintiff's operative pleading was his Original Complaint. Bard removed this action on November 12, 2015 [Dkt. No. 1], and Plaintiff filed his FAC on December 3, 2015 [Dkt. No. 31]. Therefore, in deciding this Motion to Remand, this Court should assess the Original Complaint and disregard Plaintiff's FAC, which was filed after Bard's Notice of Removal.

2. CPMC Is Fraudulently Misjoined

As demonstrated in Bard's Notice of Removal, Plaintiff has fraudulently misjoined CPMC, and Bard properly removed this case to federal court. *See* Bard's Notice of Removal [Dkt. No. 1] at pp. 6-8. Where a defendant is fraudulently misjoined, its presence will not defeat diversity. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996) (holding diversity of citizenship requirement was satisfied by reason of fraudulent misjoinder doctrine because the alleged transactions involving the non-diverse defendants were wholly distinct from the alleged transactions involving the diverse defendants), *abrogated on other grounds in Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000); *Sutton v. Davol, Inc.*, 251 F.R.D. 500, 505 (E.D. Cal. 2008) (applying fraudulent misjoinder doctrine and holding that claims involving products liability and medical negligence do not arise out of the same transaction or occurrence and should not be joined together); *Greene v. Wyeth*, 344 F. Supp. 2d 674, 684-85 (D. Nev. 2004) ("[T]his Court agrees with the Fifth and Eleventh Circuits that the [*Tapscott*] rule is a logical extension of the established precedent that a plaintiff may not fraudulently join a defendant in order to defeat diversity jurisdiction in

federal court.") (internal citations omitted).

Federal courts within the Ninth Circuit have applied the doctrine of fraudulent misjoinder to cases involving claims for medical negligence and products liability. For instance, in *Sutton*, 251 F.R.D. 500 (E.D. Cal. 2008), the court held that plaintiffs' malpractice claims against defendant healthcare providers were fraudulently misjoined with claims against the defendant manufacturers for the allegedly defective mesh patch. *Id.* at 503-505. The court found "compelling" the defendants' arguments in favor of removal, "***especially in the context of Multi-District Litigation***." *Id.* at 504 (emphasis added). Thus, the court severed the claims against the healthcare providers and remanded them to state court "so as to preserve the removing Defendants' right to removal in the remaining multidistrict action and to preserve the interests of judicial expediency and justice so that all pre-trial discovery on the products liability case can be coordinated in a single forum." *Id.* at 505.

Courts in other Circuits have likewise held that claims against a health care provider for medical malpractice are not properly joined with a product liability action against a manufacturer if they do not arise out of the same transaction or occurrence and, instead, are legally and factually distinct from one another. *See, e.g.*, *In re Stryker Rejuvenate & ABG II Hip Implant Products Liab. Litig.*, No. CIV. 13-1811 DWF/FLN, 2013 WL 6511855, at *4 (D. Minn. Dec. 12, 2013) ("The joinder of any malpractice, negligence, or misrepresentation claim against the Hospital Defendants with the other product liability claims (that are properly asserted against the device manufacturer) is inappropriate because the claims do not both involve common questions of law or fact and assert joint, several, or alternative liability 'arising out of the same transaction, occurrence, or series of transactions or occurrences.'" (quoting Fed. R. Civ. Proc. 20(a))); *Stone v. Zimmer, Inc.*, No. 09-08202-CIV, 2009 WL 1809990, at*4 (S.D. Fla. June 25, 2009) ("The joinder of the malpractice claim against [the doctor] and the [pain management center] with the product liability claim against [the product manufacturer] is thus inappropriate because these claims do not both involve common questions of law or fact and do not assert joint, several or alternative liability arising out of

the same transaction, occurrence or series of transactions or occurrences.") (internal quotation omitted); *In re Guidant Corp., Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, Case No. 07-1129, 2007 WL 5377783, at *7 (D. Minn. June 4, 2007) (severing and remanding only the claims against defendant hospital because "the basis for the causes of action against [the hospital] do not arise from the same transaction and occurrences as those in the causes of action against the [medical device manufactures]"); *In re Rezulin Products Liab. Litig.*, No. 00 CIV. 2843 (LAK), 2003 WL 21276425, at *1 (S.D.N.Y. June 2, 2003) (plaintiff fraudulently misjoined medical malpractice claims with product liability claims "because the claims do not both involve common questions of law or fact and assert 'joint, several, or alternative liability . . . arising from the same transaction, occurrence, or series of transactions or occurrences.'" (quoting Fed. R. Civ. Proc. 20(a))).

Bard acknowledges that the Ninth Circuit has not yet adopted or rejected the fraudulent misjoinder doctrine, and that, as Plaintiff points out, certain federal district court opinions in California have declined to apply the doctrine of fraudulent misjoinder. However, Plaintiff's brief fails to address Bard's argument that the legal and factual basis for applying fraudulent misjoinder in this action is particularly "compelling" in the context of a pending MDL, where Plaintiff's claims against Bard can be handled in the most efficient and consistent manner. *Sutton*, 251 F.R.D. at 504 ("Defendants' legal and factual position [advocating for the application of fraudulent misjoinder] is compelling, especially in the context of Multidistrict Litigation."). Plaintiff's brief also fails to take into account the stark difference between his product liability claims against Bard on the one hand and his medical malpractice claims against CPMC on the other.

a. Plaintiff's Claims Against CPMC and Bard Do Not Arise Out of the Same Transaction or Occurrence, or Series of Transactions or Occurrences

Like the plaintiff's claims in *Sutton*, Plaintiff's medical malpractice claims against CPMC do not arise out of the same transaction or occurrence, or series of transactions or occurrences, as his products liability claims brought against Bard. Thus, joinder of the claims

against CPMC and Bard fails to meet the requirements under Federal Rule 20, which permits joinder of defendants in a single action if (i) "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences"; and (ii) "any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. Proc. 20(a)(2).

Here, the products liability claims against Bard are based on the "development, testing, assembling, manufacture, packaging, labeling, preparing, distribution, marketing, supplying, and/or selling" of the Bard Recovery® Filter. Compl. [Dkt. No. 1-2] at ¶ 1. By contrast, the medical malpractice and breach of fiduciary duty claims against CPMC are based on whether CPMC owed a duty to Plaintiff six years after it provided its treatment and care for Plaintiff, and whether CPMC breached the duty of care and/or its fiduciary duty to Plaintiff by allegedly failing to inform Plaintiff about a publically available FDA Public Health Notification directed to physicians and health care providers on August 9, 2010. *See, e.g.*, *id.* at ¶¶ 54-62.

Plaintiff's Complaint would require one jury to analyze Bard's state of knowledge at the time that the filter at issue was designed, developed, tested, and sold, and to also separately assess the knowledge of and standard of care applicable to a hospital in assessing a notice by the FDA about IVC filters years after the filter was developed and sold. Of note, the FDA notice relied on by Plaintiff in its action against CPMC does not deal specifically with the Recovery® Filter or even filters manufactured by Bard, but instead deals with all retrievable IVC filters that had ever been marketed up to that time.[3] Therefore, Plaintiff's theory against Bard is specific to the Recovery® Filter, whereas, Plaintiff's theory against CPMC would require a jury to assess CPMC's duty to inform all of its patients that ever had an IVC filter placed prior to the FDA's notice in 2010. Plaintiff's claims allege divergent theories against Bard and CPMC that involve different duties, different time frames, and

[3] *See* FDA's August 9, 2010 Notice, available at http://www.fda.gov/MedicalDevices/Safety/AlertsandNotices/ucm221676.htm.

different products. Thus, the claims against CPMC are legally and factually distinct from the claims against Bard, and they are fraudulently misjoined.

Even if this Court were to look to Plaintiff's FAC in assessing Plaintiff's Motion to Remand, the same result would apply. Under Plaintiff's re-cast allegations in his FAC, the claims against CPMC turn on whether it discharged its duty of care as a health-care provider. *See* FAC [Dkt. No. 31] at ¶¶ 67-68, 122-123. Bard's alleged development, sale, testing, and/or regulatory compliance with regard to its Recovery® Filter are immaterial to these claims against CPMC. *See Sutton*, 251 F.R.D. at 505 ("Plaintiffs' claims based on strict products liability against the removing Defendants are separate from Plaintiffs' claims of medical malpractice against the California Defendants in implanting a previously recalled patch in Plaintiff . . . [the] claims against the California Defendants are not based on the allegedly negligent testing and manufacture of the Patch and cannot be under California law."); *see also Greene*, 344 F. Supp. 2d at 683 ("Although each of the Plaintiffs' claims against the Wyeth Defendants may regard the 'same transaction or occurrence'—i.e., the manufacture and marketing of Fen-Phen—this characterization of the complaint would not apply equally to the physician and sales representative who were joined as Defendants."). Under similar circumstances, courts have found that medical malpractice and product liability claims do not arise out of the same transaction or occurrence. *See In re Guidant*, 2007 WL 5377783 at **5-6 (holding that claims involving products liability and medical negligence do not arise out of the same transaction or occurrence and should not be joined together); *Stone*, 2009 WL 1809990, at *4 ("The joinder of the malpractice claim against [the doctor] and the [pain management center] with the product liability claim against [the product manufacturer] is thus inappropriate because these claims do not both involve common questions of law or fact and do not assert joint, several or alternative liability arising out of the same transaction, occurrence or series of transactions or occurrences.") (internal quotation omitted); *In re Rezulin*, 2003 WL 21276425 at **1-2 (where plaintiff attempted to assert product liability claims against physician defendant in addition to a medical malpractice claim, court noted

that "plaintiff had no meaningful possibility of success" against the physician on the product liability claims and that defendant physician and defendant manufacturer were improperly joined in the action as "the claims [that were properly asserted against them independently of one another] do not both involve common questions of law or fact and assert 'joint, several, or alternative liability . . . arising from the same transaction, occurrence, or series of transactions or occurrences'") (citing Fed. R. Civ. P. 20).

Because Plaintiff's medical malpractice claims against CPMC and his product liability claims against Bard do not arise out of the same transaction or occurrence, or series of transactions or occurrences, they are improperly joined under Rule 20.

b. Fraudulent Misjoinder Properly Protects Defendants' Right To Remove Diverse Claims From Unwarranted Forum Manipulation

The doctrine of fraudulent misjoinder prevents a plaintiff from avoiding removal by improperly joining claims against a non-diverse defendant that are legally and factually distinct from proper claims against a diverse defendant. Thus, like the doctrine of fraudulent joinder, fraudulent misjoinder prevents a plaintiff from interfering with a defendant's right to removal. *See Sutton*, 251 F.R.D. at 505 (noting that fraudulent misjoinder "preserve[s] the removing Defendants' right to removal in the remaining multidistrict action"). *Cf. id.* at 503 ("A defendant's right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy" (internal quotation marks omitted)).

Plaintiff argues that fraudulent misjoinder is "bad policy" because a court must allegedly first determine whether it has jurisdiction before it can exercise its power to sever certain claims. Pl.'s Mot. to Remand [MDL 2641 Dkt. No. 603] at p. 7. This argument misses the point. By acknowledging that the claims against Plaintiff are fraudulently misjoined, the Court has subject matter jurisdiction to act, because the presence of a fraudulently misjoined defendant does not defeat diversity. *See Tapscott*, 77 F.3d at 1359 (11th Cir. 1996) (holding that the presence of fraudulently misjoined defendant did not defeat diversity). *Cf.*

Kensinger v. E.I. Du Pont de Nemours, 244 Fed. App'x 114, 116 (9th Cir. 2007) (holding that the presence of a fraudulently joined defendant is ignored for purposes of determining diversity).

Plaintiff also argues that "[t]he better practice is to bring a motion in state court to challenge joinder." Pls. Mot. to Remand [MDL 2641 Dkt. No. 603] at p. 7 (quoting *Carper v. Adknowledge, Inc.*, 2013 WL 5954898, at *4 (C.D. Cal. 2013)). However, moving to sever in state court prior to removal would offer defendants no protection against unfair forum manipulation. Under the "voluntary act" rule, a complaint that is not initially removable on its face can become removable only by a voluntary act of the plaintiff. *See* 28 U.S.C. § 1446(b)(3); *Self v. Gen. Motors Corp.*, 588 F.2d 655, 657 (9th Cir. 1978) ("[A] suit remains in state court unless a "voluntary" act of the plaintiff brings about a change that renders the case removable"). Therefore, even if a motion to sever were successful in state court, it is unlikely that a defendant could then remove the now-diverse claims to federal court because an order severing claims over the plaintiff's opposition is not a "voluntary act." The claims would be severed, but the defendant still would be deprived of its right to a federal forum. The fraudulent misjoinder doctrine solves this conundrum by protecting the defendant's right to remove while also allowing for the post-removal severance of claims that are not properly joined.

Accordingly, this Court can and should find that CPMC is fraudulently misjoined to adequately protect Defendants' right to remove the diverse claims alleged against them.

c. Fraudulent Joinder Test Does Not Apply to Fraudulent Misjoinder

Plaintiff argues that even if this Court were to apply the fraudulent *misjoinder* doctrine, it should follow "the same test applied for fraudulent *joinder*" and should apply the doctrine only "when the plaintiff obviously cannot state a claim against a defendant even after amending his or her complaint." Pl.'s Mot. to Remand [MDL 2641 Dkt. No. 603] at p. 9 (emphasis added). This argument confuses the issues and has been rejected by another federal court in within the Ninth Circuit. As the court in *Sutton* stated in rejecting this same

argument, "[b]ecause the *Tapscott* fraudulent misjoinder exception is applied, the *McCabe* test for fraudulent joinder is inapplicable."[4] *Sutton*, 251 F.R.D. at 505. Therefore, to succeed on its fraudulent misjoinder argument, Bard does not need to demonstrate that Plaintiff cannot state a claim against CPMC.[5]

B. Consent of CPMC Is Not Needed for Removal

Plaintiff erroneously argues that Bard's removal was procedurally improper because CPMC did not join the removal or consent to it. *See* Pl.'s Mot. to Remand [MDL 2641 Dkt. No. 603] at p. 5. But a defendant's consent to removal is not needed if that defendant is fraudulently misjoined. As the Eastern District of California stated, "failure to obtain the consent of an improperly joined defendant . . . does not negate an otherwise proper removal." *Sutton*, 251 F.R.D. at 506. *Cf. United Computer Systems, Inc. v. AT & T Corp.*, 298 F.3d 756, 762 (9th Cir. 2002) ("Although the usual rule is that all defendants in an action in a state court must join in a petition for removal, the 'rule of unanimity' does not apply to 'nominal, unknown or fraudulently joined parties'"); *Rico v. Flores*, 481 F. 3d 234, 239 (5th Cir. 2007) ("[A] removing party need not obtain the consent of a co-defendant that the removing party contends is improperly joined"). Here, because CPMC is fraudulently misjoined, Bard was not required to obtain its consent prior to removing this action.

C. Alternatively, Plaintiff's Claims Against CPMC Should Be Severed and Remanded Pursuant to Rule 21

For the reasons set forth in Section III.B, *supra*, Plaintiff's claims against CPMC are fraudulently misjoined to the product liability claims against Bard and should therefore be severed and remanded. In the alternative, if this Court finds that CPMC is not fraudulently misjoined, this Court should sever and remand the claims against it pursuant to Federal Rule

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[4] Plaintiff cites *Davis v. Prentiss Props. Ltd.*, 66 F. Supp. 2d 1112 (C.D. Cal. 1999) to support his argument regarding the application of the fraudulent joinder test. *See* Pl.'s Mot. to Remand [MDL 2641 Dkt. No. 603] at p. 9. The *Davis* court relies on *McCabe v. General Foods Corp.*, 811 F.2d 1336 (9th Cir. 1987) in forming the test for fraudulent joinder. *See Davis*, 66 F. Supp. 2d at 1114.

[5] Regardless, as noted above, CPMC has filed a Motion to Dismiss [MDL 2641 Dkt. No. 870] asserting that Plaintiff cannot state a claim against it.

of Civil Procedure 21.

The court in *Greene* recognized such authority under Rule 21 in a similar context:

> [T]his Court is mindful of its authority under the Federal Rules of Civil Procedure, Rule 21, to add or drop parties to a suit "at any stage of the action and on such terms as are just." Therefore, the Court is inclined to sever claims where the joinder is procedurally inappropriate and clearly accomplishes no other objective than the manipulation of the forum, and where the rights of the parties and interest of justice is best served by severance.

Greene, 344 F. Supp. 2d at 685.

Similarly here, the Court should exercise its authority under Rule 21 to sever and remand Plaintiff's medical malpractice claim against CPMC and deny Plaintiff's Motion to Remand as to the product liability claims against Bard, as such severance would allow Plaintiff's product liability claims against Bard to remain in the Bard IVC Filter MDL for efficient and consistent resolution. Further, the severance of Plaintiff's malpractice claim against CPMC would not prejudice Plaintiff as his claims would not be dismissed, but rather remanded for resolution by the state court. *See* Fed. R. Civ. Proc. 21 ("Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.")

D. Plaintiff Is Not Entitled to an Award of Attorneys' Fees

If this Court should decide to remand this action, it should deny Plaintiff's request for attorneys' fees under 28 U.S.C. § 1447(c). It is well established that "absent unusual circumstances, attorney's fees should not be awarded when the removing party has an objectively reasonable basis for removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005). In the context of determining whether a magistrate appropriately assessed fees against Bard in a fraudulent misjoinder case where the court declined to recognize the doctrine, another District Court within the Ninth Circuit reversed the magistrate's decision assessing attorneys' fees against Bard, stating that "the Court cannot find that Bard lacked an objectively reasonable basis for seeking removal or relying on *Tapscott*." *Dent v. Lopez*,

No. 1:14-CV-442-LJO-SMS, 2014 WL 3838837, at *3 (E.D. Cal. July 30, 2014). The court in *Dent* recognized "the difference in opinion between courts in the Ninth Circuit with regard to the fraudulent misjoinder doctrine" as a basis for Bard's objective reasonableness in removing the case. *Id.*

Here, as in *Dent*, Bard has an objectively reasonable basis for removing this action. The Ninth Circuit has not formally accepted or rejected the *Tapscott* fraudulent misjoinder doctrine, and district courts within this Circuit have applied the doctrine in cases similar to this one. *See Sutton*, 251 F.R.D. at 504-505; *Greene*, 344 F. Supp. 2d at 685. Even Plaintiff admits that these two cases in this Circuit have applied the doctrine. *See* Pl.'s Mot. to Remand [MDL 2641 Dkt. No. 603] at p. 8.

There is simply no basis for Plaintiff to argue that it was unreasonable for Bard to rely on these prior district court opinions, given the absence of binding precedent to the contrary. Should this Court grant Plaintiff's Motion to Remand, it should deny Plaintiff's request for attorneys' fees.

IV. CONCLUSION

For the foregoing reasons, Bard requests that this Court sever and remand the medical malpractice claims against CPMC pursuant to Rule 21 of the Federal Rules of Civil Procedure, because those claims are fraudulently misjoined to Plaintiff's product liability claims against Bard.

This 26th day of February 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 26, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send notification of such filing to all counsel of record.

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